

## **CUMULATIVE PROVOCATION IN DOMESTIC VIOLENCE AGAINST WOMEN: A COMPARATIVE ANALYSIS BETWEEN MALAYSIA AND ENGLAND AND WALES**

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### **ABSTRACT**

**Background and Purpose:** In Malaysia, there is no specific defence for female victims of domestic violence who in the unfortunate event killed their abusive partners due to provocation. In this instance, they can raise the defence of provocation as expressly stated in Exception 1 to section 300 of the Penal Code (Exception 1). Since the defence was not formulated specifically in the context of domestic violence, the application of the defence may not be able to appreciate the uniqueness of female victims of domestic violence. One notable issue is that of cumulative provocation. Exception 1 is silent as to the legal status of cumulative provocation. However, there have been cases where the accused raised cumulative provocation as a defence against the offence of murder. The research therefore, aims to analyse the legal position of cumulative provocation in Malaysia.

**Methodology:** This research employed a doctrinal legal research approach, conducting a thorough analysis of relevant laws, including the Penal Code (Act 574), Homicide Act 1957 (HA 1957), and the Coroners and Justice Act 2009 (CJA 2009). In addition to statutory analysis, an examination of case law was undertaken to gain insights into the court's interpretation of the legal status of cumulative

provocation. Furthermore, scholarly writings in this field were examined to provide a thorough understanding of the subject.

**Findings:** The decisions of the Federal Court's cases of *Che Omar bin Che Akhir v Public Prosecutor* [2007] 4 MLJ 309 and *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621 show that cumulative provocation does not fall under Exception 1. This might lead the court to look only at the events that took place immediately before the killing as a single act. This can lead to a perception that the accused's response, including female victims of domestic violence to provocation is not sufficiently grave. Hence, it is proposed that the cumulative provocation is given statutory recognition under Exception 1 which allows the circumstances of the accused to be taken into account by the court in deciding the defence of provocation.

**Contributions:** This research contributes to the corpus of legal knowledge on cumulative provocation in domestic violence against women within the legal framework of the criminal justice system.

**Keywords:** Provocation, murder, cumulative provocation, defence & penal code.

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## 1.0 INTRODUCTION

Provocation is a partial defence which is set out in Exception 1 to section 300 of the Penal Code (Exception 1), subject to the conditions, and if successfully raised, it would reduce the murder to culpable homicide. In Malaysia, the defence is general in nature and can be raised by an accused person irrespective of gender. Historically, the defence could be traced back to English common law (Hemming, 2011). Terrance et al. (2012) argued that the defence was designed taking into account the male experience and to protect the men's honour. Thus, Chan (2006) was of the view that since the defence was not formulated specifically in the context of domestic violence, the application of the defence may not be able to appreciate the uniqueness of female victims of domestic violence who experienced provocation, which may be different from other categories of accused, thereby possibly preventing them from obtaining fair defence and protection under the criminal justice system. One of the issues that may arise from the defence of provocation is the issue of cumulative provocation. Mousourakis (2007, p. 291)

defined cumulative provocation as “*cases involving a prolonged period of maltreatment of a person at the hands of another, which culminates in the killing of the abuser by her victim.*” This definition refers to past events between the accused and the victim that occurred continuously and repeatedly over a period of time resulting in the accused committing murder. Next, the same term has been defined by Buchhandler-Raphael (2019, p. 1839) as “*the idea that emotional arousals stemming from anger, fear, desperation, and hopelessness may build up over time, culminating in lethal violence after the defendant has reached a “breaking point”.*” This definition explains the implicated emotions in cumulative provocation encompassing not only anger but also desperation and fear culminating in the accused reaching a breaking point where the victim is killed.

In general, the term “cumulative provocation” is not mentioned in the Penal Code. Despite that, there have been cases where the accused raised cumulative provocation as a defence against the offence of murder. The question that arises is whether cumulative provocation falls within the ambit of Exception 1. The issue has been raised in the cases of *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621 and *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309, where the Federal Court in both cases decided that cumulative provocation is not recognised within the scope of Exception 1. With these decisions, a history of past abuse and provocation between female victims of domestic violence and their abusive partners might not be considered by the court. The decisions require the court to only look at the events that took place immediately prior to the killing. This line of interpretation appears to disregard the reality of domestic violence which is continuous and repetitive in nature and this can have an impact on the opportunity for female victims of domestic violence to raise the defence. The research therefore aims to analyse the legal position of cumulative provocation in domestic violence against women in Malaysia by comparing it in England and Wales.

## 2.0 METHODOLOGY

This research adopted doctrinal legal research since it involved a detailed analysis of the Penal Code (Act 574), focusing on Exception 1 to section 300 of the Penal Code, section 3 of the Homicide Act 1957 (HA 1957), and the Coroners and Justice Act 2009 (CJA 2009) namely sections 54 to 56. Case law analysis was also carried out to comprehend the court’s interpretation of the legal status of cumulative provocation in Malaysia. The cases were searched through online databases in CLJLaw (currently known as CLJ Prime) and also Lexis Advanced Malaysia. The search was done by typing the words “provocation” and “cumulative provocation” on the databases up to the year 2020. The search found that there were different

and similar cases reported in both databases. In respect of the latter, only one of them was chosen to avoid repetition. While some discussed cases did not directly involve domestic violence against women, the selection of cases was based on their relevance in determining the position of cumulative provocation in Malaysia and the court's interpretation of cumulative provocation.

The data gathered were analysed using comparative research and analytical and critical approaches. For the former, a comparative analysis was conducted by examining the provisions of the law on provocation in Malaysia and England and Wales. Reference is made to England and Wales because the defence of provocation has been subjected to much debate and development in common law until the defence of provocation under section 3 of the HA 1957 was replaced by the defence of loss of self-control under sections 54 to 56 of the CJA 2009 in response to the constraints faced by battered women. In respect of the latter, both analytical and critical approaches were used to analyse the legal provisions of provocation. These approaches also allow to examine the weaknesses of the existing provisions of the law, after which improvements and reforms are proposed.

### **3.0 ANALYSIS AND DISCUSSION**

#### **3.1 Legal Framework of Provocation in Malaysia**

In Malaysia, the law which governs the defence of provocation is the Penal Code. The Penal Code is a substantive law that prescribes offences and defences in Malaysia. Defence of provocation against murder is set out in Exception 1. It is worth noting that in addition to Exception 1, the term "provocation" also exists in several provisions in sections 135, 334, 335, 352, 355 and 358 of the Penal Code. Looking at the sections, the punishments for those offences are lighter compared to the same offences that occur without provocation. Being charged with these categories of offences signifies a lesser degree of blameworthiness as compared to the same offences committed without provocation. For example, under section 325 of the Penal Code, the sentence of causing grievous hurt carries a maximum term of imprisonment of seven (7) years. On the other hand, under section 335 of the Penal Code, the sentence of causing grievous hurt due to provocation carries a maximum term of imprisonment of four (4) years. Section 335 of the Penal Code reads:

*Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment for a term which may extend to four years or with fine which may extend to four thousand ringgit or with both.*

This shows that the provocation serves as a mitigation factor to reduce a sentence from the original to a lighter one. For the purpose of this research, reference is made to provocation as a defence against murder under Exception 1.

### **3.2 Legal Framework of Homicide in Malaysia**

Prior to delving into an explanation of the laws that govern the provocation defence under Exception 1, it is crucial to grasp the legal framework surrounding homicide in Malaysia. The term “homicide” can be defined as the killing of one human being by another (Stephen, 2014). In Malaysia, homicide is a crime which is stipulated in Chapter XVI under the heading Offences Affecting the Human Body. Culpable homicide is explained first, followed by murder. Section 299 of the Penal Code describes the term “culpable homicide” as:

*Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

This section clarifies that the offence of culpable homicide is committed when an accused person intentionally causes the death of another person or he intentionally causes bodily injury which is likely to cause death or he knows his action is likely to result in death. This section shall be read together with the definition of murder as set forth under section 300 of the Penal Code, which states as follows:

*Except in the cases hereinafter excepted, culpable homicide is murder—*

- (a) if the act by which the death is caused is done with the intention of causing death;*
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;*
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or*
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.*

A closer look at these two sections indicates that culpable homicide is murder if it falls under the scope of section 300 of the Penal Code. Section 300 sets out the various examples whereby culpable homicide amounts to murder from paragraphs (a) to (d) (Vohrah & Hamid, 2006). Conversely, what is not covered by this section will fall under the general scope of section 299 of the Penal Code (*Public Prosecutor v Md Masud Rana* [2019] 1 LNS 1928).

Section 300 of the Penal Code goes on to provide Exceptions 1 to 5 which will reduce murder to culpable homicide not amounting to murder. The Exceptions are provocation, exceeding private defence, exceeding the powers of a public servant, sudden fight and consent. For instance, if the evidence shows that the murder resulted from provocation, as specified in Exception 1, it is then considered as culpable homicide not amounting to murder.

The punishment for culpable homicide not amounting to murder is considered less severe than that for murder, which carries the death penalty or imprisonment for a term of not less than thirty (30) years but not exceeding forty (40) years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes (section 302 of the Penal Code). In contrast, for the former as prescribed in section 304 (a) and (b) of the penal Code, it carries the maximum penalty of either imprisonment for a term not exceeding thirty (30) years and shall be liable to fine, or for a term not exceeding ten (10) years or fine or both.

### **3.3 The Law Governing the Defence of Provocation against Murder under Exception 1 to Section 300 of the Penal Code**

In Malaysia, there is no specific defence for female victims of domestic violence who, in the unfortunate event, killed their abusive partners due to provocation. In this instance, they can

raise the defence of provocation as expressly stated in Exception 1 which comprises a main provision together with three provisos and an explanation with several illustrations (Mohd Safri, 2017). The reason is that Exception 1 is a neutral defence and can be raised by any accused regardless of gender. The wording of the Exception 1 is presented below for clarity:

*Exception 1 - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:*

- (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;*
- (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;*
- (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.*

Based on Exception 1, the accused who wishes to place reliance on this defence must meet several conditions. Firstly, it is necessary to show that there is grave and sudden provocation that would cause any reasonable person to lose his or her self-control (*Public Prosecutor v Yusof Saruan* [2019] 7 CLJ 190). While Exception 1 is silent on the requirement of the reasonable man test in raising the defence of provocation, the Supreme Court in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 with reference to the Indian's case of *K. M. Nanavati v State of Maharashtra* 1962 SCR Supl. (1) 567 has required the defence of provocation to satisfy the reasonable man test. Hence, for the defence to succeed, the accused has to pass two tests. The subjective test is the first one that the accused must pass, meaning that an evaluation by the court of all the facts and events of a given case will be conducted to decide if the accused was deprived of self-control due to sudden and grave provocation. If the accused passes the first test, he must then pass the test of the reasonable man. This second test refers to the hypothetical reasonable man and that if he were to be put in the shoes of the accused, would he also be provoked into losing self-control? In addition, a thorough reading of Exception 1 indicates that other conditions also have to be met. The third condition is that the accused does not seek or voluntarily incite provocation. To put it another way, the accused should not incite the deceased, in the hope that the deceased would resort to provocation in return, so as to justify the accused's act. In *Chong Teng v Public Prosecutor* [1960] 1 LNS 14,

this was clearly explained. In this case, the High Court rejected the accused's defence of provocation due to the accused having gone to pick a fight with the victim at the market, the reason being that the victim had taken away the accused's wife. It was held by the Court that the deceased did not suddenly provoke the accused (if at all), and that since the relationship between them had been stressed before the events of the case, such provocation from the deceased was anticipated. In addition, an act cannot amount to provocation if it is to obey the law or by a public servant in the lawful exercise of the powers. For example, A is stopped on the side of the road by the police and later questioned about running red lights. If A is provoked by the police's actions and then kills the latter, A cannot successfully invoke the defence of provocation because the police were carrying out their duties. Furthermore, nothing done in the lawful exercise of the right to private defense as outlined in sections 96 to 106 of the Penal Code constitutes provocation.

### 3.4 Cases of Cumulative Provocation Under Exception 1 to Section 300 of the Penal Code

Exception 1 is silent as to the legal position of cumulative provocation. Despite that, there were attempts made by the accused in the cases listed in Table 1 to put forward cumulative provocation as a defence against the offence of murder.

Table 1: Case search involving the defence of cumulative provocation

No.	Case law	Decision
1.	<i>Mat Sawi bin Bahodin v Public Prosecutor</i> [1958] 24 MLJ 189	Accepted
2.	<i>Public Prosecutor v Lasakke</i> [1964] 1 MLJ 56	Accepted
3.	<i>Che Omar bin Mohd Akhir v Public Prosecutor</i> [2007] 4 MLJ 309	Rejected
4.	<i>Abd Razak Bin Dalek v Public Prosecutor</i> [2011] 2 MLJ 237	Rejected
5.	<i>Rikky Purba v Public Prosecutor</i> [2014] 3 CLJ 607	Accepted
6.	<i>Narayanan Rajangam v Public Prosecutor</i> [2015] 1 MLJ 461	Rejected
7.	<i>Public Prosecutor v Surbir Gole</i> [2017] 2 CLJ 621	Rejected
8.	<i>Wong Ban Chong v Public Prosecutor</i> [2018] 1 LNS 12	Rejected
9.	<i>Jeffrey Bin Tahlil v Public Prosecutor</i> [2020] 1 LNS 56	Rejected

Table 1 shows a total of nine (9) cases in which the accused raised the defence of cumulative provocation against the offence of murder. Of the nine (9) cases, there were three (3) cases where the courts accepted the defence of cumulative provocation, namely in the cases of *Mat Sawi bin Bahodin v Public Prosecutor* [1958] 24 MLJ 189, *Public Prosecutor v Lasakke* [1964]



1 MLJ 56 and *Rikky Purba v Public Prosecutor* [2014] 3 CLJ 607. Meanwhile, in *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621, the Federal Court accepted the accused's appeal, not because of cumulative provocation, but ruled that what the deceased did and said amounted to grave provocation under Exception 1. The remaining cases, with reference to the Federal Court cases of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309 and *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621, have rejected the plea of cumulative provocation.

One of the earliest cases discussed cumulative provocation was in *Mat Sawi bin Bahodin v Public Prosecutor* [1958] 24 MLJ 189. In this case, taking into consideration a long history of domestic unhappiness on the part of the appellant and his wife, which had been aggravated by the attitude of his mother-in-law and finally triggered by the latter's last verbal abuse "*babī*" (pig) directed towards him, the Court accepted the defence of provocation and allowed the appeal. While in the judgment, the Court did not use the term "cumulative provocation", Vohrah and Hamid (2006) believed that the judgment had implied the Court's acceptance towards cumulative provocation. They further argued that the last abusive remarks served as the last straw that broke the camel's back.

The same approach was taken in *Public Prosecutor v Lasakke* [1964] 1 MLJ 56, where the court ruled that the accused successfully raised the defence of cumulative provocation, and the liability was reduced from murder to culpable homicide not amounting to murder. In this case, the victim (deceased) had attempted to engage the wife of the accused to have sexual intercourse with him. He had also proposed marriage to the accused's wife, threatening that if she wasn't divorced by the accused, he would get what he wanted by killing the accused. The last occasion was about a month before the death of the deceased. On the day in question, the deceased said to the accused, "Eh? Have you divorced your wife yet?" Afterwards, the deceased harassed the accused again by taunting, "Eh. Are you not ashamed? Don't you realise all your friends know I have interfered with your wife? Why don't you divorce her? The accused did nothing, but his eyes welled with tears of humiliation. The accused decided to go home, but as he reached the steps, the deceased, who was standing there, held him and struck him on the forehead. Then, commotion ensued and resulted in the death of the deceased. The Court found that the accused was at that moment deprived of the power of self-control as the act of provocation was, having regard to all the circumstances, sufficiently grave and sudden. In this case, the Court further explained the grave provocation to include cumulative provocation as follows: "*The series of grave provocation deprived the accused of his power of self-control and the final provocation having regard to all the circumstances of the case was sufficiently grave and sudden to prevent the offence from amounting to murder.*" This case

showed that the events that can be referred to are not limited to the events that happened shortly before the murder but also cover the “series of act” which indicates a series of provocative incidents that occur wherein the context of this case refers to three occasions where the victim wanted to rape the accused’s wife.

The same legal principle was applied in the case of *Rikky Purba v Public Prosecutor* [2014] 3 CLJ 607. The facts of the case were that the appellant was charged with murder and causing hurt with a dangerous weapon. The prosecution relied on prosecution witness 12’s (PW12) testimony, stating that after she and her husband (deceased) had a bath and returned to their room, the appellant entered suddenly and repeatedly attacked the deceased with two knives. The appellant then stabbed PW12’s right hand three times as she attempted to grab the phone. Despite being hurt, PW12 managed to call her sister for help, leading to the appellant’s arrest. In his defence, the appellant claimed a misunderstanding occurred when he took two buckets of water from the bathroom. The appellant stated that the deceased rushed him to finish quickly as he wanted to bathe. The appellant asserted that the deceased provoked him by uttering insulting and provoking words and punching him in the face. The deceased then went to take a parang and a sharp weapon, and a fight ensued between them. Subsequently, the appellant entered the room, armed with a knife, and the altercation escalated, resulting in the death of the deceased and injuries to PW12. During the appeal, one of the defences raised by the appellant was a cumulative provocation. On the issue of cumulative provocation, the Court of Appeal ruled that it falls within Exception 1. It is evident from the court’s judgment stating that: “Now, the concept of cumulative provocation has been recognised by Indian and Malaysian Courts.” In reaching this conclusion, the Court of Appeal referred the book entitled *Criminal Law in Malaysia and Singapore*, 2nd edition, LexisNexis (Yeo et al., 2012, pp. 805-806) which states:

*The Indian courts have recognized this concept of cumulative provocation ever since the inception of the Penal Code. The early recognition of cumulative provocation is remarkable given that English law at the time of the Code’s promulgation restricted the provocative conduct to that which occurred immediately prior to the killing. The following third proposition of the Indian Supreme Court in Nanavati merely reaffirmed the longstanding position: The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.*

Besides, the Court of Appeal also relied on the Indian authorities namely *K. M. Nanavati v State of Maharashtra* 1962 SCR Supl. (1) 567. Consequently, the Court of Appeal did not only consider the events that happened immediately prior to the killing but also all relevant circumstances preceding or surrounding that act.

However, a different approach was taken in the case of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309. In this case, the appellant's wife left their matrimonial house in Kuala Lumpur and returned to Sarawak with their daughter. Concerned, the appellant flew to Sarawak to search for them and found his wife at her mother's stall with a man named Awang Jamaluddin. When the appellant questioned her about her actions and absence, the wife stated that her activities were her own business. She openly declared her relationship with Awang. The appellant further stated that the wife spoke loudly and rudely to him to the point where he could not bear to hear her responses. Fueled by anger at her replies, the appellant took a knife and stabbed the wife several times. At appeal, the appellant argued that the crime of murder was mitigated by the fact that the act of killing was contributed by gradual and accumulated provocation. The argument was rejected by the Federal Court on the grounds:

*... there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness (as in the case here) a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the PC.*

The Federal Court's interpretation of cumulative provocation in *Che Omar bin Mohd Akhir* was later followed by the Court of Appeal in *Abd Razak Bin Dalek v Public Prosecutor* [2011] 2 MLJ 23. Consequently, the defence raised was rejected.

However, by contrast, the subsequent Court of Appeal's case in *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621 did not follow the principle adopted by *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309 but rather followed its own decision in *Rikky Purba v Public Prosecutor* [2014] 3 CLJ 607. In *Surbir Gole*, the accused, who was the employee of the deceased, asserted that he had endured prolonged mental abuse from the deceased. The sequence of events unfolded as follows: Firstly, the accused experienced ill-treatment and mental torture over a substantial period. This mistreatment included being denied leave and compelled to work from 7 am to 9 pm. Besides, the deceased had been verbally abusing him, calling him 'mad', 'crazy', 'stupid', 'cow', and 'bastards'. On the day of the incident, the deceased once again subjected the accused to verbal abuse, uttering the words,

“ibu yang mana satukah melahirkan anak seperti kamu?” (which mother gave birth to a child like you?). These words deeply affected the accused, especially since, at that time, his mother was unwell. Before the incident, the accused tried to visit his ailing mother but had been rejected by the deceased. According to the accused, the verbal abuse on the day of the incident by the deceased had really enraged him. He finally snapped, lost his self-control and killed the deceased. Based on the evidence, the Court of Appeal was, of the unanimous view that the evidence pointed to cumulative provocation and affirmed the sentence imposed upon the accused by the High Court. (Criminal Appeal No: J-05-49-03/2014, para 48). The Court of Appeal, in this case, later described the term “cumulative provocation” as follows:

*Cumulative provocation is a series of acts or words over a period of time which culminates in the sudden and temporary loss of self-control. This provocation is not confined to the last acts before killing the accused; there may have been previous acts or words which when added, caused the accused to lose his self-control although the last act may not be sufficient to cause provocation (Criminal Appeal No: J-05-49-03/2014, para 31).*

The Court of Appeal had interpreted Exception 1 to include cumulative provocation provided that it causes sudden and temporary loss of self-control. In this case, the Court considered the past events that took place between the accused and the victim to know the true context of how it caused the accused to lose control and kill the victim. However, this decision was short-lived. Upon appeal to the Federal Court, the decision of the Court of Appeal in *Surbir Gole* [2017] on the issue of cumulative provocation was consequently reversed by the former. However, the defence of provocation under Exception 1 was allowed by the Federal Court, albeit based on grave and sudden provocation, and not cumulative provocation. The Federal Court confirmed this in *Surbir Gole* in paragraph 34 (below), which clarifies the legal status of cumulative provocation:

*We ought to be reminded that the defence of “cumulative provocation” does not exist in our criminal law, and therefore we are not persuaded that it is a permissible defence to s. 300 of the Penal Code. Only the defence of grave and sudden provocation is specifically provided for in Exception 1 to s. 300 in the Penal Code.*

It is, nonetheless, also important to note that despite the decision in *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621 expressly agreeing with the case of *Che Omar bin Mohd Akhir* and the

approach taken in it, the Federal Court did not limit its assessment of the case to the events that took place at the time of the murder. Instead, the court took into consideration a few other key factors. One of them was the circumstances before the day of murder. The judgment as quoted below demonstrates this clearly:

*We wish to reiterate, however, that provocation to an accused person that is ordinarily and by itself not grave may be grave enough to fall within Exception 1 to s. 300 when, after all the circumstances of the case before and during that provocation are taken into consideration, it can be concluded that “a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be as provoked as to lose his self-control.*

It can be deduced from the decision above that the Court did not limit its assessment to the actions of the deceased just before he was killed, but also took into consideration numerous events in the past which fueled the accused’s rage. Paragraphs 41 - 42 reported the following:

*As mentioned above, in his evidence, the accused testified that he had been constantly mistreated by the deceased by the use of harsh and abusive words.  
A few days before the date of the incident, according to the accused, the abusive words became worse.*

In deciding whether there was grave provocation or not, the court considered the previous abuse inflicted by the deceased that the accused had to endure, thus implying that cumulative provocation was considered as a defence. In other words, despite the rejection of cumulative provocation as a defence, the fact that the Federal Court in *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621 took into account events from the past may suggest differently. It is worth noting that post-Federal Court’s case of *Surbir Gole*, the court’s interpretation of cumulative provocation is rather consistent. This can be seen in recent cases such as *Wong Ban Chong v Public Prosecutor* [2018] 1 LNS 12 and *Jeffrey Bin Tahil v Public Prosecutor* [2020] 1 LNS 56, where the Court of Appeal referred to both *Che Omar bin Che Akhir* and *Surbir Gole* in rejecting the defence of cumulative provocation raised by the accused because it did not fall within the meaning of Exception 1.

In short, the courts in Malaysia have different interpretations of cumulative provocation. The difference in interpretation is due to the cumulative provocation status, which

is neither mentioned nor defined by the Penal Code. Since the Penal Code is silent on this, the Court, in the case of *Rikky Purba v Public Prosecutor* [2014] 3 CLJ 607, held that the concept of cumulative provocation is part of Exception 1. In contrast to other cases such as *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309 and *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621, the Federal Court interpreted the wording of Exception 1 by strictly limiting to only grave and sudden provocation to the effect of excluding cumulative provocation. With these decisions, the court may not consider a history of past abuse and provocation between the accused and the victim, including instances involving female victims of domestic violence and their abusive partners. The decisions require the court to only look at the events that took place immediately prior to the killing as a single act. It is worth noting that domestic violence is hard to understand nor evaluate without reference to previous dealings between the parties or without knowing their full history. This line of interpretation does not align with the uniqueness of domestic violence faced by them, which is continuous and repetitive, and this can have an impact and opportunity for them to raise the defence of cumulative provocation. This is because domestic violence cannot be seen as a single or one-off act, in reality, it occurs continuously and repeatedly. Therefore, what happened in the past should not be set aside by the court in making decisions related to the defence of provocation involving murder cases in the context of domestic violence. The following explains the position of cumulative provocation in England and Wales.

### **3.5 Legal Position of Cumulative Provocation in England and Wales**

The court's approach on the issue of cumulative provocation has gone through an evolutionary phase from section 3 of the HA 1957 until its replacement by the defence of loss of self-control under sections 54 to 56 of the CJA 2009. Thus, to better understand cumulative provocation, the following discusses the position of cumulative provocation in two phases, namely the phase under section 3 of the HA 1957 and also sections 54 to 56 of the CJA 2009.

#### ***3.5.1 Cumulative provocation under section 3 of the Homicide Act 1957***

Section 3 of the HA 1957 was introduced in 1957. It stated that:

*Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.*

The term “cumulative provocation” was not mentioned in section 3 of the HA 1957. It is, therefore, important to refer to the case law to comprehend the legal position of cumulative provocation. The first relevant case to be discussed is *R v Fantle* [1959] Crim LR 585, where the Court ruled that the whole history was deemed relevant. However, a different approach was taken in the case of *R v Brown* [1972] 2 All ER 1328, where the Court ruled that the history of provocation was restricted to the morning of the killing, meaning that if an event of violence occurs far from the date of the murder, the event becomes increasingly irrelevant (Edwards, 1997). Later in the 1990s, as a consequence of the battered woman syndrome (BWS) theory, which was introduced in the United States, more evidence of BWS was presented before the court in support of the prolonged effects of domestic violence on women (Rix, 2001). The BWS usually presents itself after long-term and serious abuse, where women who suffer from this disorder come to believe that they deserve the abuse and cannot get away from it, which explains why some women remain in abusive situations and why they sometimes resort to violence to end abusive relationships (Terrance et al., 2012).

The first case is *R v Ahluwalia* [1992] 4 All ER 889. The defendant and her (deceased) abusive husband had been married for years. The defendant had been repeatedly beaten and abused and had suffered multiple injuries. The deceased had provoked the defendant on the night of the killing about having an affair, threatening to beat the defendant and use a hot iron on her. This led the defendant to set her husband on fire while he was asleep. He died from severe burn injuries a week later. During the trial, it was argued by the defendant that she just wanted to cause her husband some pain, and that she did not intent to kill him. The defendant was convicted and given a life sentence. In this case, the lawyer argued that a woman who has been subjected to year of verbal and physical abuse may kill her abuser because of a slow burn reaction to the continuous ill-treatment. In response to such submission, Lord Taylor CJ held that:

*We accept that the subjective element in the defence of provocation would not, as a matter of law, be negated simply because of the delayed reaction in such cases, provided that there was at the time of the killing a 'sudden and temporary loss of self-control' caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation. (p. 896)*

The case recognised that in domestic abuse cases, the defendant may have a slow-burn reaction to long period of provocation. Section 3 of the HA 1957 still required the defendant to meet a sudden loss of self-control (Ellison, 2019). At appeal, the Court of Appeal accepted new medical evidence which was proffered by the defence to show that the defendant suffered from BWS as a result of prolonged years of abuse. The Court of Appeal ordered retrial and she was found guilty of manslaughter by the reason of diminished responsibility. This case has been hailed as a landmark since for the first time, a court in the United Kingdom had accepted evidence on BWS (McColgan, 1993). Similarly, in the case of *R v Thornton No.2* [1996] 2 ALL ER 1023, medical evidence was presented at appeal to show that the defendant suffered from BWS which affected her personality as a result of her husband's repeated violence. The Court of Appeal allowed her appeal and quashed the conviction of murder ordered for a retrial. The defendant then pleaded guilty to manslaughter due to reasons of diminished responsibility.

The case of *R v Humphreys* [1995] 4 All ER 1008 is the best example to illustrate the recognition of cumulative provocation (Martin & Storey, 2015). In this case, the sixteen-year-old defendant had left home to become a prostitute. The defendant then had an affair with a man older than him (deceased) who was a drug addict. The deceased encouraged the defendant to engage in prostitution and also often beat her. To get attention, the defendant would cut her wrists, which she had done in the past. The victim was drunk on the day he was killed, and the defendant had cut herself on the wrists again. Furthermore, at the time, the facts showed that the victim was naked, giving the defendant the impression that the former threatened her with forced sex. The defendant stabbed the deceased to death after losing her self-control, after which she was charged with the victim's murder. She raised the defence of provocation by presenting a history of cumulative provocation, concluding with the victim's jeers about how she had not made a good job of cutting herself on the wrists. In this case, the defendant raised the defence of provocation and relied on cumulative provocative behaviour culminating in the taunt about the inefficiency of her wrist-cutting. A consultant psychiatrist gave evidence to show that she suffered from BWS. However, the defence failed and she was convicted of



murder. The case was later appealed. In allowing the appeal, the Court of Appeal referred to the defendant and victim having a “tempestuous relationship”:

*The tempestuous relationship of Humphreys and Armitage was a complex story with several distinct and cumulative strands of potentially provocative conduct building up from the start of the relationship to the final encounter. Guidance, in the form of a careful analysis of these strands, should have been given by the judge so that the jury could clearly understand their potential significance. No such guidance was given. (p. 1023)*

On the point of cumulative provocation, the Court of Appeal ruled that it was incorrect for the trial court to deal with the provocative taunt in isolation from the entire history of the abusive relationship.

It can be summarised that in the cases of *Ahluwalia* and *Thornton*, BWS evidence was presented to show the impact of prolonged years of abuse on the mental states of the defendants. With the evidence, the Courts considered a history of past abuse in determining the defence raised by them even without statutory recognition of cumulative provocation under section 3 of the HA 1957. Nevertheless, the defence of provocation failed because of the requirement of suddenness. The defence then relied on BWS evidence to prove that they suffered from a mental abnormality in establishing the defence of diminished responsibility. On the other hand, in *Humphreys*, the Court explicitly required the jury to take into consideration the history of an abusive relationship in determining whether the defendant had lost her self-control or not. These cases, which had gained the media and academic attention in England, were key in movements calling for law reform to the defence of provocation in England (Fitz-Gibbon, 2013). Following the proposals by the Law Commission in its Partial Defences to Law Commission Report No. 290 (2004), the defence of loss of self-control replaced the defence of provocation by way of sections 54 to 56 of the CJA 2009. While reformed, the new defence still retain its main predecessors features which is loss of self-control thus making it relevant when comparing with the defence of provocation under Exception 1 which require the same.

### ***3.5.2 Cumulative provocation under the Coroners and Justice Act 2009***

After the defence of loss of self-control replaced the provocation, the question arises as to whether cumulative provocation is recognised under the new defence? To answer this question, reference must be made to the provisions of sections 54 and 56 of the CJA 2009. Referring to section 54(1)(c) of the CJA 2009, the defendant’s circumstances may be considered by the

court for the purpose of this defence. Based on this section, Carr and Johnson (2013) argued that the jury can now take regarding all the circumstances of the defendant's case together with the history of anything he or she may have suffered at the hands of the abuser. Section 54(3) elaborates that "the circumstance of D" as a reference to all of the defendant's circumstances other than those whose only relevance to the defendant's conduct is that they bear on the defendant's general capacity for tolerance or self-restraint. It is thus indicated by this provision that in evaluating whether an individual of similar age and gender to the defendant that has a normal capacity for self-restraint and tolerance would have acted similarly in response, the court may take into account the defendant's circumstances as a whole. Further, the question on cumulative provocation was addressed and affirmed in the case of *R v Dawes*; *R v Hatter*; *R v Bowyer* [2013] 3 ALL ER 308. A pertinent issue that cropped up and required the Court of Appeal's decision during the appeal was whether, in the context of the recent defence of loss of self-control, cumulative provocation could apply? Lord Judge CJ answered in the affirmative:

*Thus, for the purposes of the new defence, the loss of control may follow from the cumulative impact of earlier events ... the response to what used to be described as 'cumulative provocation' requires consideration in the same way as it does in relation to cases in which the loss of control is said to have arisen suddenly. Given the changed description of this defence, perhaps 'cumulative impact' is the better phrase to describe this particular feature. (p. 322)*

In short, the appeals in the above cases affirmed the legal position of cumulative provocation under the CJA 2009.

The question arises regarding the need to submit expert evidence on BWS in cases involving the defence of provocation in murder under the CJA 2009. Norrie (2010) argued that rather than focusing on the medico-legal category of BWS, the new law will encourage female defendants "... to portray themselves as ordinary people grievously and acting out of a legitimate sense of anger at what has been done to them." Weare (2013) contended that women will still be able to apply evidence that proves they had been battered, despite it maybe not being evidence that they were victims who suffered from BWS in particular. In brief, cumulative provocation can be accepted under the defence of loss of self-control under the CJA 2009, even without BWS evidence. Having said that, the new defence does not preclude the defendant from presenting BWS evidence supporting the defence of loss of self-control. In

brief, the reform of the defence of provocation is primarily inspired by the constraints faced by women who relied on the defence of provocation for killing their abusive partners.

### **3.6 Comparison of Cumulative Provocation between Malaysia and England and Wales**

In general, the legal status of cumulative provocation is not specified in Malaysia. The same was applied in the defence of provocation under section 3 of the HA 1957 before it was substituted by the defence of loss of self-control under the CJA 2009. Due to ambiguity concerning the legal position of cumulative provocation under Exception 1, it has been inconsistently interpreted and applied by the courts over the years. Only post-Federal Court's case of *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621, the court's interpretation of cumulative provocation is rather consistent which is rejecting the plea of cumulative provocation and decided that it falls outside the scope of Exception 1. On the other hand, in England, while the old defence of provocation under section 3 of the HA 1957 was also silent as to the defence of cumulative provocation, with the assistance of BWS evidence, the court took a more flexible approach in accepting cumulative provocation as was decided in *R v Ahluwalia* [1992] 4 All ER 889, *R v Humphreys* [1995] 4 All ER 1008 and *R v Thornton No.2* [1996] 2 ALL ER 1023, so long as it resulted in a sudden loss of self-control. In respect of the new defence of loss of self-control under the CJA 2009, sections 55(1)(c) and (4) of the CJA 2009 clearly permit the court to consider cumulative provocation in deciding the defence of loss of self-control. This principle has been affirmed and approved in the case of *R v Dawes*; *R v Hatter*; *R v Bowyer* [2013] 3 ALL ER 308.

At present, in Malaysia, so far, expert evidence on BWS has not yet been tendered in court concerning the defence of cumulative provocation against murder. The reason might be that at the moment the cases reported did not involve female victims of domestic violence who kill their abusive partners on provocation. With that said, expert evidence that resembles BWS was presented and accepted in *Nisalma binti Saat v Public Prosecutor* [2018] MLJU 880 involving private defence. In this case, the High Court emphasised that the facts of the case should not be limited to only the day in question. The High Court regarded the history of past violence endured by the accused in determining whether or not the accused had a reasonable apprehension of danger at the time of the killing. This can be seen from the findings of the High Court, which stressed the need to consider the whole facts of the case cumulatively, including the past violence until the day of the murder in question, in better understanding whether the elements of the defence were successfully met or otherwise. On the other hand, in the 1990s, consequent to the introduction of BWS in the United States, evidence on BWS began

to be introduced in England and Wales. Expert evidence on BWS was first presented in *R v Ahluwalia* [1992] 4 All ER 889 and accepted. The testimony of experts on BWS is important, among others, to show the effects of domestic violence on women that occur continuously and repeatedly. This also shows the relevance of the history of past provocation in influencing the actions of the accused to be seen as a whole. This ruling allowed female victims of domestic violence to present BWS evidence through expert testimony while raising the defence of provocation. With the introduction of the new defence of loss of self-control under the CJA 2009, cumulative provocation has now been recognised. The section provides that the court may consider the defendant's circumstances when deciding on the defence of loss of self-control. However, this does not prevent the defendant from presenting evidence of BWS in support of this defence.

#### 4.0 CONCLUSION AND RECOMMENDATIONS

In general, cumulative provocation is not specified in Malaysia. Based on the decision of the Federal Court's cases of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309 and *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621, followed by the subsequent cases such as the cases of *Wong Ban Chong v Public Prosecutor* [2018] 1 LNS 12 and *Jeffrey Bin Tahil v Public Prosecutor* [2020] 1 LNS 56, it is evident that cumulative provocation does not fall under Exception 1. Consequently, this might lead the court to look only at the events that took place immediately before the killing as a single act. This can lead to a perception that the accused's response, including female victims of domestic violence, to provocation is not sufficiently grave. It is important to note that in certain cases such as domestic violence, there are certain factors that cause the victim of domestic violence to be unable to escape and get caught up in a violent relationship such as economic dependency factors, and fear for her own safety and the safety of any children she may have. Disregarding cumulative provocation may not reflect the reality that the emotions sustained by female victims of domestic violence after being subjected to a long period of abuse, followed by one final provocative act which may result in loss of self-control. It does not mean when recognising cumulative provocation, the law will be biased towards women over men. This is because victims of domestic violence consist of not only women but also men, as spelt out in section 2 of the Domestic Violence Act 1994.

The question may arise as to the rationale for considering cumulative provocation. The rationale for regarding evidence of cumulative provocation is to understand the whole context of the case that triggered the final incident (Mitchell, 2012). This approach reflects the human

reality that a person may have been provoked into killing through repeated and continuous provocation extending over a lengthy period. In light of this, it is proposed that the cumulative provocation is given statutory recognition under Exception 1 which allows the circumstances of the accused to be taken into account by the court in deciding the defence of provocation. In this way, the court can consider the relevant history of earlier events between the parties leading to the killing. It is important to note that considering past events does not mean that this defence of provocation can be easily proved and can be abused as a means of evasion from the application of the law. But what is more important is to enable the court to understand the whole picture of event properly.

It is also realised that allowing cumulative provocation may also have its own drawbacks. Thus, as a precautionary measure, to ensure that this defence is used for a legitimate reason rather than as a disguise for deliberation and revenge, cumulative provocation is also proposed to be subjected to the requirement of the accused to prove the last triggering event. It is worth noting that allowing cumulative provocation without tying it to the requirement of the accused to prove the last triggering incident may open room for abuse. This is because it allows the accused to rely on past incidents to kill at present without any present valid triggered reasons, thus giving rise to revenge or deliberation rather than due to genuine loss of self-control. It means that regardless of the prolonged years of abuse and provocation, the accused must be able to prove the last provocative incident leading to loss of self-control. Moreover, to avoid cumulative provocation from being ill-manipulated, it is proposed that the application will be barred if the accused acted with a considered desire for revenge. This proposed provision is similar to England and Wales's, which excludes the defence of self-control from being used for revenge purposes. It also needs to be stressed that it does not mean that whenever cumulative provocation is adduced in court, the court should automatically reduce the accused's liability from murder to culpable homicide, but it permits the court to consider the whole picture of the event properly and also subject to the accused's ability to fulfil other conditions under Exception 1.

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